

31 March 1997

Re: NEPA Call-In Technical Inquiry 0047 - Siting in a Floodplain

Dear NEPA Call-In User:

The National Environmental Policy Act (NEPA) Program Manager, PBS Cultural and Environmental Affairs Division asked NEPA Call-In to provide you with information on the proper procedure to follow when a GSA action may involve siting a facility in a floodplain. NEPA Call-In is an information clearinghouse and research service which provides GSA realty personnel with policy and procedural information pertaining to NEPA compliance. Specifically, NEPA Program Manager asked us to provide you information on "floodplain waivers."

As a result of research conducted for previous Technical Inquiries, NEPA Call-In has learned "floodplain waivers" are in violation of Executive Order (EO) 11988, "Floodplain Management," (enclosed) and therefore cannot be utilized by GSA. However, a facility can be sited in a floodplain if GSA determines there are no practicable alternatives to siting the facility in the floodplain. The procedures are generally described in EO 11988.

EO 11988 applies to any Federal action including acquiring, managing, and disposing of Federal lands and facilities; providing Federally undertaken financed, or assisted construction and improvements; and conducting Federal activities affecting land use, such as planning, regulating, or licensing activities. EO 11988 seeks to avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative. Section 2(a)(1) states: "Before taking an action, each agency shall determine whether the proposed action will occur in a floodplain..." Section 2(a)2 states:

"If an agency has determined to, or proposes to, conduct, support, or allow an action to be located in a floodplain, (or 500 year floodplain for critical actions), the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplains. If the agency head finds the only practicable alternative consistent with the law and with the policy set forth requires siting in a floodplain, the agency shall, prior to taking action:

1. Design or modify its action in order to minimize potential harm to or within the floodplain, consistent with regulations issued in accord with Section 2(d) of this Order; and
2. Prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain."

The FEMA guidance document, "Further Advice on Executive Order 11988, Floodplain Management" (enclosed), states practicable alternatives can include carrying out the proposed action outside of the floodplain, accomplishing the same objective using other means, or taking no action at all. There can be alternative sites within the floodplain that should be evaluated if there are no practicable sites outside the floodplain. The floodplain location itself must be shown to be practicable before the action can be taken, and the need to select a floodplain location must be clearly demonstrated. Further, if after compliance with the requirements

of EO 11988, new construction of structures or facilities are to be located in a floodplain, accepted flood proofing and other flood protection measures shall be applied to new construction or rehabilitation. To achieve flood protection, agencies shall, wherever practicable, elevate structures above the base flood level rather than filling in land.

NEPA Call-In also reviewed the GSA document ADM 1095.2 "Consideration of flood plains and wetlands in decisionmaking," October 31, 1983 (enclosed). This document provides more detailed instructions on how to implement EO 11988, including instructions on how to proceed when the agency has determined there are no practicable alternatives to siting a facility in a floodplain. Chapter 2, "Implementing the Flood Plains and Wetlands Orders," Section 1(a)(2) states: "When an action affecting a flood plain or wetland is proposed, it shall be taken only if the following conditions are met:

1. There is no practicable alternative outside the flood plain or wetland,
2. The "no action" alternative is not practicable, and
3. The flood plain or wetland site has been determined practicable."

Section 2 of ADM 1095.2, "The Decisionmaking Process," prescribes the following:

1. Section 2(b), "Early Public Review," states: "As soon as it is known that the proposed action may involve property in a base flood plain or wetland, the proposed action shall undergo early public review to allow interested parties the opportunity to offer their views....";
2. Section 2(c), "Alternatives," states: "If the proposed action could be in a base flood plain or wetland or could affect a base flood plain or wetland, the responsible official shall determine if there are any practicable alternatives....";
3. Section 2(d), "Impact," states: "The impacts of each alternative, the hazards involved with each alternative, and available mitigating measures shall be identified and analyzed in comparative form....The responsible official shall consider economic, environmental, and other pertinent factors when evaluating the impacts of the alternatives. The NEPA implementation processes are the principal means of identifying impacts..."; and
4. Section 2(e), "Decision," states: "A decision on an action which could be located in or which may have an impact upon a base flood plain or a wetland shall not be made until the environmental assessment, final EIS, or other impact analyses and alternative studies have been completed. If the responsible official selects the alternative which is located in or which may have an impact upon a base flood plain or a wetland, he or she shall request that the Administrator approve the proposed course of action. The Administrator shall approve the proposed course of action only if:
 - (a) There is no practicable alternative outside the flood plain or wetland;
 - (b) The no action alternative is not practicable, and
 - (c) The flood plain or wetland site has been determined practicable, or

- (d) The requirements of subpar. 1a(7) are followed for real property disposal actions.
5. Section 2(f), "Minimize impacts," states: "The processes in (a) thru (e), below, shall be used to minimize impacts from actions undertaken in flood plains and wetlands.
- (a) If the action is the subject of an environmental assessment (EA) or an environmental impact statement (EIS) all practicable mitigating measures identified in the EA or EIS shall be adopted.
 - (b) If the action is to be undertaken in a base flood plain, it must at a minimum meet the standards and criteria, and be consistent with the intent of, the National Flood Insurance Program. It may deviate from this only if the standards are demonstrably inappropriate. This means actions will be designed and carried out as they would be to meet at a minimum the substantive requirements for eligibility under the National Flood Insurance Program even though GSA actions are not insured under this program.
 - (c) All practicable means shall be taken to "floodproof" structures and to design or modify structures and/or actions to minimize potential harm to or within the flood plain. Elevation of a structure above the base flood level or the 500-year level for critical actions shall be taken whenever practicable instead of filling in land. This shall be accomplished by the use of open works, for example, columns, walls, piles, or piers.
 - (d) Part 11, step 5 of the Water Resources Council Guidelines shall be referenced for additional guidance and examples of actions that may be utilized to minimize harm to lives and property and to restore and preserve the natural and beneficial values served by flood plains.
 - (e) If the action is to be undertaken in a wetland, the action shall be designed or modified using all practicable measures consistent with the intent of the National Environmental Policy Act and the Wetlands Order to minimize harm to the wetland."
6. Section 2(g), "Public notice," states: "Public notices are required by the Flood Plains Order."
7. Section 2(h), "Implement," states: "When the actions in a thru g, above, have been taken, the proposed action may be implemented. The responsible official shall ensure that the action is accomplished in compliance with the Flood Plains and Wetlands Orders."

To determine how to document GSA's determination that siting a facility in a floodplain is the only practicable alternative, NEPA Call-In obtained a copy of a floodplain "Document of Determination," utilized by GSA Region 4 (enclosed) for your reference.

The materials in this TI have been prepared for use by GSA employees and contractors and are made available at this site only to permit the general public to learn more about NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based

upon laws, regulations, and policies in place at the time it was prepared and that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher